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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

WALTER MINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Matsushita's 1990 acquisition of MCA Inc. gave rise to shareholder class action litigations in Delaware state court and later in California federal district court. The named plaintiffs in both litigations claimed to represent the former shareholders of MCA. The federal district court denied class action status to the federal litigations and entered summary judgment for defendant Matsushita. The parties to the Delaware state litigations negotiated an "opt out" class action settlement providing for the release of all claims, state and federal. A judgment on that settlement was entered by the Delaware Court of Chancery and affirmed by the Delaware Supreme Court. Thereafter, the Ninth Circuit Court of Appeals entertained an appeal from the order dismissing the federal actions sponsored by MCA shareholders who had released their federal claim for consideration pursuant to the Delaware settlement. The court of appeals refused to honor the release and refused to give full faith and credit to the state court judgment. The court of appeals held—contrary to the law of the First and Third Circuits—that state courts lack the power to approve a class settlement releasing exclusively federal claims. This case presents the following questions:

1. Whether a federal court can withhold full faith and credit from a state court final judgment approving a class action settlement simply because the settlement released federal claims.

2. Whether a federal court can automatically imply a private right of action under an agency regulation, here Securities and Exchange Commission Rule 14d-10, on the sole ground that the enabling statute has been held to be privately enforceable.

3. Whether a statutorily-defined tender offer time period, with fixed parameters triggering other statutory regulations, can be judicially expanded to include a transaction that occurred outside the tender offer period.

PARTIES TO THE PROCEEDING

The named plaintiffs in the federal class action, *Epstein, et al. v. MCA Inc., et al.*, No. 92-55675 (C.D. Cal.), are Lawrence Epstein, John Linder, Jane Rockford (as trustee of the Michael J. Rockford Trust), Maurice Karlin, Ruth Karlin, Beth Ann Karlin, and Bert P. Karlin. The plaintiff in *Minton v. MCA Inc.*, No. 92-55632 (C.D. Cal.), is Walter Minton. These two cases were consolidated by the district court and the court of appeals, and they are treated as one case for purposes of this petition. The defendants in both actions are MCA Inc., Matsushita Acquisition Corporation, Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corporation, Lew Wasserman, and Sidney J. Sheinberg.

All claims against MCA Inc., Lew Wasserman, and Sidney J. Sheinberg have been dismissed and those defendants are no longer parties to the action. Matsushita Acquisition Corporation no longer exists by virtue of being merged into MCA Inc.

RULE 29.1 STATEMENT

Pursuant to Sup. Ct. R. 29.1, Petitioners Matsushita Electric Industrial Co., Ltd. and Matsushita Holding Corporation hereby state that their only parent or subsidiary that is not wholly-owned is Cineplex Odeon Corporation.

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WALTER MINTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Matsushita Electric Industrial Co., Ltd. and Matsushita Holding Corporation ("Matsushita") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals, *see* Appendix ("App.") 1a-44a, is reported on Westlaw at 1995 WL 75487. The opinion has not yet been assigned pagination in the Federal Reporter. The findings of fact and conclusions of law of the district court (App. 45a-61a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 27, 1995 (App. 1a), and denied a timely petition for rehearing and rejected a suggestion for rehearing in banc on April 6, 1995

(App. 62a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Section 1738 of Title 28 provides, with respect to the authenticated acts, records and judicial proceedings of any State, that:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

SEC Rule 14d-10, 17 C.F.R. § 240.14d-10, provides, in relevant part:

> No bidder shall make a tender offer unless: (1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and (2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

The complete text of Rule 14d-10 is set forth at App. 105a-106a.

STATEMENT OF THE CASE

Petitioners respectfully suggest that this case presents three issues worthy of certiorari. First, the court of appeals denied Full Faith and Credit to a final judgment entered on a class action settlement in Delaware state court, asserting a "policy" requiring that exclusively federal claims be resolved by settlement only in a federal court. This decision disables parties in a state court class action from reaching a global settlement of all claims or exchanging general releases where an exclusively federal claim has been or arguably could be asserted. It thus retroactively calls into question the finality of all state court class action settlements releasing federal claims as to which the statute of limitations has not run. By compromising the finality of judgments entered in state courts, the court of appeals intrudes on the ability of state courts to fully resolve cases involving both federal and state

claims. This interference with the ability of state courts to resolve complex litigation is particularly striking in this case because Delaware is recognized as having a significant interest in the regulation of corporate affairs, a matter primarily of state concern.[1]

Second, the court of appeals implied a private right of action under SEC Rule 14d-10, concluding that when Congress enacted Section 14(d)(7) in 1968 it intended the federal courts to recognize an implied right of action under all of the rules promulgated thereunder, including Rule 14d-10, which the SEC did not adopt until 18 years later. This automatic implication of a private right of action contravenes bedrock principles of this Court and conflicts with the approach of the District of Columbia, Third and Sixth Circuit Courts of Appeal.

Finally, compounding these errors, the Ninth Circuit enlarged in an indeterminate way the scope of Rule 14d-10 by shifting the operative event that triggers regulation. The court of appeals extended the restriction that Rule 14d-10 imposes "during [a] tender offer" to any transaction regardless of when it occurs, if the transaction may be deemed to be "an integral part" of a tender offer. This holding, which directly conflicts with the law of the Fourth Circuit, replaces a clear and certain standard (the defined tender offer period) with a subjective one (the "integral part" test), thereby injecting massive uncertainties into the federal regulation of tender offers.

A. The Acquisition of MCA

Matsushita purchased MCA for $6.6 billion in 1990. The two-step acquisition involved a public tender offer for MCA shares and a privately negotiated purchase of the MCA shares owned by

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[1] The Delaware courts' expertise in matters of corporate law grows out of the fact that "Delaware is the state of incorporation of roughly half of the Fortune 500 companies." Frank H. Easterbrook & David R. Fischel, *The Economic Structure of Corporate Law* 212-13 (1991). *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1343 (7th Cir. 1990) (Delaware courts are the "Mother Court of corporate law"), *rev'd on other grounds*, 500 U.S. 90 (1991); *NCR Corp. v. American Tel. & Tel. Co.*, 761 F. Supp. 475, 499 (S.D. Ohio 1991); *see generally* William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351, 355 (1992).

MCA founder Lew Wasserman (the "Wasserman transaction"). The tender offer price of $66 per share was paid in cash and tendering shareholders received close to a 100% premium over the market price. The Wasserman transaction consisted of a tax-free exchange of Wasserman's MCA shares for an illiquid preferred stock designed by Matsushita and MCA to be no more valuable than the tender offer consideration. The Wasserman transaction, which was fully disclosed in the public tender offer materials, was intended to satisfy Mr. Wasserman's unique tax planning and estate needs arising in part from his age (77 in 1990) and his extremely low basis in the MCA stock ($.03 per share). *See Epstein Plaintiffs' Excerpts of Record* ("ER") 357, Ex.I at ¶¶ 1, 7.

Petitioner and Respondents stipulated during proceedings in the district court that the Wasserman transaction was entered into and consummated when no tender offer was pending. App. 49a-50a.

B. The State and Federal Actions

Class actions were filed on behalf of MCA shareholders in the Delaware Court of Chancery in September 1990 upon the publication of reports that Matsushita was seeking to acquire MCA. The class actions were consolidated and the Delaware court ordered expedited discovery.

In December 1990, the first federal class action was filed in the United States District Court for the Central District of California. That complaint, together with several subsequently-filed related actions, alleged that Matsushita's tender offer violated Rule 14d-10, which requires equal consideration for all stock purchases made "during [a] tender offer." In April 1991, the district court denied plaintiffs' motion for class certification.

In February 1992, the California district court granted summary judgment to Matsushita and dismissed the federal complaints. Respondents appealed this decision to the Ninth Circuit Court of Appeals.

While the appeal was pending, the parties in the Delaware actions negotiated a settlement of all claims arising out of Matsushita's acquisition of MCA. The settlement provided all shareholders the right to opt out of the settlement.[2]

The Delaware Chancery Court certified a class for settlement purposes and approved a form of notice to the class that described in detail the federal claims asserted in the California district court actions and the status of the appeals in the Ninth Circuit. *See* App. 77a-101a. The notice made clear that approval of the Delaware settlement would release all state and federal claims arising out of the MCA transaction—specifically including those claims asserted in the California district court actions—and advised class members that they could preserve their state and federal claims by opting out of the settlement. App. 93a-94a, 96a-97a. In response to the class notice, only 19 of the more than 10,000 former MCA shareholders chose to opt out.[3]

The Delaware Chancery Court approved the settlement and entered a judgment releasing all claims of the class members who chose not to opt out. In determining that the settlement was "fair and reasonable," the Chancery Court considered the value of all of the state and federal claims that would be released, acknowledged that particular care should be taken in reviewing a settlement that would bar claims pending elsewhere, noted the possibility of a reversal by the Ninth Circuit, and rejected an attack on the adequacy of the representation of the Delaware class. App. 63a, 67a-70a.

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[2] Earlier, while the federal actions were still pending in the California district court, an agreement was reached in the Delaware proceeding for a non-opt out class settlement that would have released all claims arising out of the MCA acquisition in exchange for non-monetary consideration. The Chancery Court rejected this proposed settlement. *See In re MCA Inc. Shareholders Litig.*, 598 A.2d 687 (Del. Ch. 1991). The Chancery Court concluded that since the federal securities claims were pending in the district court, they had "at least arguable merit" and it would be unfair to release them in a non-opt out settlement. *Id.* at 691-93, 695-96.

[3] The 19 opt-outs included Respondents Rockford, Minton, and six Minton family members and investment trusts. Respondents Epstein, Linder and the Karlins elected *not* to opt out. No named Respondent objected to the settlement in the Delaware Chancery court.

Thereafter, in September 1993, the Delaware Supreme Court affirmed the Chancery Court on the basis of the lower court's opinion. App. 76a.

C. The Opinions Below

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

The federal complaints allege that the tender offer violated SEC Rule 14d-10 on the theory that the preferred stock Wasserman received was allegedly more valuable than the $66 cash tender offer consideration. Since it was stipulated that the Wasserman transaction was entered into before the public tender offer commenced and consummated after the tender offer had expired (ER 354, § 5), the district court held that the Wasserman transaction was not regulated by Rule 14d-10 and granted summary judgment in favor of Matsushita dismissing the federal actions. App. 52a-60a.

During the pendency of the appeal of this decision to the Ninth Circuit, the Delaware Supreme Court affirmed the Delaware judgment approving the state court settlement. App. 76a. Matsushita invoked the Delaware final judgment in the Ninth Circuit as a bar to prosecution of the appeal by the parties who had participated in the Delaware settlement. Matsushita relied on the Full Faith and Credit Act, 28 U.S.C. § 1738, and the law of this Court enunciated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), regarding the binding effect of opt out class action settlements. The Ninth Circuit, however, refused to grant full faith and credit to the Delaware judgment, holding that a class settlement involving the release of exclusively federal claims cannot be approved in state court. The Ninth Circuit reversed the order granting summary judgment to Matsushita, entered summary judgment for plaintiffs holding that the Wasserman transaction violated Rule 14d-10, and directed certification of a class consisting principally of the thousands of MCA shareholders who had chosen *not* to opt out of the Delaware state court settlement and *who had already accepted the proceeds of the Delaware settlement.*

REASONS FOR GRANTING THE PETITION

1. *Full Faith and Credit.* For nearly three decades the federal courts have uniformly held that state and federal claims can be released in a state court settlement. *See, e.g., TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982); *Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383-84 (9th Cir. 1978); *Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 762 (2d Cir. 1968). The court of appeals ignored this uniform case law and fashioned an unprecedented exception to the Full Faith and Credit Act in direct conflict with the law of the First and Third Circuits.[4] The court of appeals' decision seriously impairs the ability of state courts to settle complex litigation. As a practical matter, it forces class action litigants into a federal forum because it is now wholly improvident for a defendant to settle a state class action raising allegations that could also be the basis for an exclusively federal claim. *See, e.g., Raskin v. Birmingham Steel Corp.*, 1990 WL 193326 at *7 (Del. Ch. Dec. 4, 1990) ("[i]n many cases of this kind a fair settlement of a claim arising from the fairness of a merger will entail the release of federal securities law claims arising from the merger . . . . Settlement of stockholder class actions asserting breach of corporate directors fiduciary duties would hardly be practicable otherwise") (citations omitted). Thus, state class actions are radically discouraged. The court's decision also opens the door to manipulation by class members who, as in this case, can obtain the benefits of a settlement in state court and thereafter litigate in federal court.

The legal system depends upon the finality of judgments. In order to enter judgment upon the settlement, the Delaware Chancery Court was obligated to and did find that the class was adequately represented and that the settlement was fair and adequate. App. 73a-74a. Those findings were affirmed by the Delaware Supreme Court. This having been done, the legal effect of the settlement should have been determined once and for all;

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[4] *See Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1564 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994); *Sandler Assocs., L.P. v. BellSouth Corp.*, 818 F. Supp. 695 (D. Del. 1993), *aff'd*, 26 F.3d 123 (3d Cir.), *cert. denied*, 115 S. Ct. 481 (1994).

under the Full Faith and Credit Act, the court of appeals could not properly disregard the judgment entered upon the settlement. There is a recognized public policy favoring the finality of judgments entered on settlements because courts should facilitate (not undermine) freedom of contract. *See, e.g., Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 313 (7th Cir. 1980) ("there is an overriding public interest in favor of settlement .... Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources").

Where a judgment is entered on a settlement, full faith and credit has the important consequence of holding parties to their bargain. The court of appeals' decision, however, permits federal courts to override a state court judgment entered upon a settlement, and thus to disregard one purpose of the Full Faith and Credit Act by allowing parties to renege on their court-approved agreements. Indeed, the court of appeals' decision retroactively threatens the finality of an unknown number of fully consummated state class action settlements which involved the release of federal claims. *See Nottingham Partners v. Dana*, 564 A.2d 1089, 1104 (Del. 1989) ("the Court of Chancery has a history of approving settlements that have implicitly or explicitly included a general release, which would also release federal claims") (footnote omitted).

This Court has held in a series of cases from *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), to *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), that certain federal statutes which confer exclusive federal jurisdiction do not create an exception to Section 1738. And the First and Third Circuits have held that state court judgments releasing federal securities law claims are entitled to full faith and credit. When this Court denied certiorari in the *Grimes* and *Sandler* cases last year, there was no inter-circuit conflict on the preclusion issue presented here. Now there are four circuit court cases addressing the issue, and this case irreconcilably conflicts with the other three. This case squarely presents the unresolved issue of whether the Williams Act creates an exception to Section 1738 in the context of a state court judgment entered on a class action settlement releasing federal securities law claims.

2. *Private Right of Action.* The court of appeals is the first in the nation to hold that every regulation promulgated under a statute that has been held to be privately enforceable automatically confers its own private right of action—regardless of the language or purpose of that regulation. This conception is at odds with "settled interpretive principles regarding implied causes of action," *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1455 (1994), and conflicts with the law of other Circuits. The holding below, harking back to *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), authorizes the creation of new private rights that lack a basis in congressional intent. This case presents a timely opportunity to address the circumstances under which agency regulations may be enforceable by private suit.

3. *Tender Offer Regulation.* The Fourth Circuit has recognized that Rule 14d-10, which regulates the payment of certain consideration "during [a] tender offer," operates—just as a no parking sign operates—only during a defined period and not at other times. *See Kahn v. Virginia Retirement Sys.*, 13 F.3d 110 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994). The parties here had stipulated that the Wasserman transaction was agreed to and consummated when no tender offer was pending. The court of appeals held, however, *as a matter of law*, that because the Wasserman transaction was "conditioned" on the successful completion of the public tender offer, it would be "deemed" to have taken place *during* the tender offer even though it did not in fact take place at that time. App. 17a-18a. The court of appeals superimposed on the statutorily-specified tender offer period an ill-defined extension of that period. The court held that since the Wasserman transaction "is deemed a part of the tender offer, the tender offer does not end, by definition, until [the Wasserman transaction] is performed [and] [p]erformance of [that transaction] ... will therefore take place 'during the tender offer ....'" App. 17a, n.19. Thus, the court of appeals sharply limited the ability of tender offerors to confidently structure transactions in accordance with clearly defined rules, thereby creating enormous uncertainty in the law.

I. THE COURT OF APPEALS HAS CREATED AN ANOMALOUS EXCEPTION TO THE FULL FAITH AND CREDIT ACT THAT WILL FRUSTRATE THE SETTLEMENT OF CLASS ACTION LITIGATION

The Delaware state court judgment was entered on a settlement expressly terminating the federal claims of MCA shareholders who participated in the settlement. *See* App. 102a-104a.[5]

A. As Recognized by the First and Third Circuits, a State Court Judgment Approving a Class Action Settlement Releasing State and Federal Claims is Entitled to Full Faith and Credit

A federal court determining the preclusive effect of a state court judgment must apply the preclusion law of the state in which the judgment was rendered. *Kremer*, 456 U.S. at 481-82; *see also Parsons Steel*, 474 U.S. at 525-26 (reversing and remanding for determination under state preclusion rules the effect of state court judgment on federal Bank Holding Company Act claim); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 387 (1985) (reversing and remanding for determination under state preclusion rules the effect of state court judgment on exclusively federal antitrust claim). When a release is embodied in a Delaware state court judgment, making it a record and judicial proceeding under the Full Faith and Credit Act, the release becomes entitled to the same preclusive effect in a federal court that it would be given under Delaware law. The law of Delaware recognizes that a judgment entered on a settlement is entitled to full preclusive effect. *See In re Union Square Assocs. Secs. Litig.*, 1993 WL 220528 at *3 (Del. Ch. June 16, 1993); *Sternberg v. O'Neil*, 1989 WL 137932 at * 4 (Del. Ch. Nov. 9, 1989); *Schlaeppi v. Delaware Trust Co.*, 525

[5] The Delaware judgment stated that "[a]ll claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, any rules or regulations promulgated thereunder, or otherwise), whether known or unknown . . . *including without limitation the claims asserted in the California Federal Actions* . . . are hereby compromised, settled, released and discharged with prejudice by virtue of the proceedings herein and this Order and Final Judgment." App. 74a-75a (emphasis added).

A.2d 562, 565 (Del. Ch.), *aff'd*, 523 A.2d 981 (Del. 1986), *cert. denied*, 484 US 826 (1987).[6]

The First and Third Circuits have expressly held that a federal court must grant full faith and credit to a Delaware state court judgment entered upon a class action settlement that releases federal securities claims. *Grimes*, 17 F.3d at 1557, 1563-64; *Nottingham*, 925 F.2d at 32-33. Contrary to the holdings in *Nottingham* and *Grimes*, the court of appeals held:

> We believe that a state court cannot require passive class members to contractually release their exclusively federal claims in order to enjoy the benefits of a state class action, when the court has no jurisdictional power to dispose of those claims either directly or indirectly through the doctrine of issue preclusion.

App. 40a. This conclusion is directly at odds with *Nottingham*, 925 F.2d at 34, which involved a Delaware state court class action settlement, and in which the First Circuit held:

> [A]s a matter of federal law, a state court can approve and enforce a settlement which requires a party to release claims actually brought, or potentially "bringable," in federal court under "exclusive jurisdiction" federal statutes even though the state court could not adjudicate claims arising under such statutes.

In *Grimes*, which also involved a Delaware state court class action settlement, the Third Circuit held that it too:

> recognize[s] the broad power of state courts to approve and enforce settlements which reflect the parties' intent to release all claims arising from a transaction regardless of whether the class action court has jurisdictional competency to hear those claims.

[6] Delaware law also provides that "[w]hen a state court settlement of a class action releases all claims which arise out of the challenged transaction and is determined to be fair and to have met all due process requirements, the class members are bound by the release or the doctrine of issue preclusion. Class members cannot subsequently relitigate the claims barred by the settlement in a federal court." *In re MCA, Inc. Shareholders Litig.*, 598 A.2d at 691 (citations omitted); *Union Square*, 1993 WL 220528 at *3-4 (res judicata bars any claim that "arises (at least partially) out of the same transaction," including "similar, though not identical claims").

17 F.3d at 1564 (citations omitted); *see also Sandler*, 818 F. Supp. at 704 (recognizing Delaware Chancery Court's "power to approve a release encompassing federal securities law claims . . . not within the subject matter jurisdiction of the Delaware State courts").[7] Significantly, *Grimes*, *Nottingham*, and *Sandler* involved *non*-opt out settlements. *See Grimes*, 17 F.3d at 1555; *Nottingham*, 925 F.2d at 33; *Sandler*, 818 F. Supp. at 700. *A fortiori*, the rights of class members who are afforded an opportunity to opt out are fully protected.

B. The Court of Appeals Improperly Held That Federal "Policy" Restricts the Operation of the Full Faith and Credit Act

The court of appeals engrafted onto the Full Faith and Credit Act an exception based on a supposed "public policy" concern for

[7] In addition to *Grimes*, *Nottingham*, and *Sandler*, other courts have recognized that individual, derivative and class settlements in state court can resolve exclusively federal claims. *See, e.g., TBK*, 675 F.2d at 460 ("we have recognized the authority of a state court to approve a settlement that releases a claim within the exclusive jurisdiction of the federal courts"); *Green*, 577 F.2d at 1383-84 (state settlement involving state fiduciary claims bars subsequent assertion of Exchange Act claims based on same facts); *Abramson*, 392 F.2d at 762 ("[a]lthough the state court could not adjudicate the federal claim, it was within its powers over the corporation and the parties to approve the release of that claim as a condition of settlement of the state action"); *Gabelli v. Sikes Corp.*, 1990 WL 213119 at *5 (S.D.N.Y. Dec. 14, 1990) (staying federal securities action pending court approval of Florida state court class settlement "because of the imminent possibility that the Florida courts will dispose of the exclusive federal issue by approving the settlement and its attendant releases"); *Lowenschuss v. Resorts Int'l, Inc.*, 1989 U.S. Dist. LEXIS 7407 at *20 & n.15 (E.D. Pa. June 29, 1989) (state court class action settlement bars exclusively federal claims), *aff'd without op.*, 947 F.2d 936 (3d Cir. 1991); *Seagoing Uniform Corp. v. Texaco, Inc.*, 705 F. Supp. 918, 923 (S.D.N.Y. 1989) (recognizing state court's authority in "class action derivative" suit to approve settlement releasing exclusively federal claims); *Bernstein v. Mediobanca Banca di Credito Finanziario-Societa per Azioni*, 78 F.R.D. 1, 2, 5 (S.D.N.Y. 1978) (general release in state court settlement bars federal securities action); *Nottingham Partners v. Dana*, 564 A.2d at 1104-05 (law "uniformly" distinguishes between state's power to approve a general release of an exclusively federal claim and its lack of power to adjudicate the same); *cf. In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (*5th Cir.* 1981) ("even when the court does not have power to adjudicate a claim, it may still approve release of that claim as a condition of settlement of [an] action [before it]") (citation omitted).

the rights of class members. App. 39a-40a & n.33. The "policy" that motivated the Ninth Circuit is that although:

- a state court judgment can determine factual issues that are preclusive with regard to later federal causes of action,[8]
- non-federal forums sometimes adjudicate causes of action within the exclusive jurisdiction of the federal courts,[9] and
- a state court-approved release terminates exclusively federal causes of action in individual and derivative actions,
- *nonetheless*, the Delaware judgment here is not to be given preclusive effect because, supposedly, only a federal court can approve a class action settlement that releases a federal securities claim.

Thus, the court of appeals held that the enactment of the Williams Act created an exception to the Full Faith and Credit Act. *See* App. 28a, n.25.[10]

[8] *See Becher v. Contour Labs., Inc.*, 279 U.S. 388, 390-92 (1929) (Holmes, J.); *Murphy v. Gallagher*, 761 F.2d 878, 886 (2d Cir. 1985).

[9] Exclusively federal claims may be decided outside of the federal courts, including (1) in arbitration, *see, e.g., Shearson v. MacMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust claims); (2) when exclusively federal claims are raised in state court by way of affirmative defense, *see, e.g., Weiner v. Shearson, Hammill & Co.*, 521 F.2d 817, 821-22 & n.22 (9th Cir. 1975); and (3) under principles of forum non conveniens, where a foreign sovereign has the ability to adjudicate "somewhat similar" claims, *see, e.g., Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991) (securities claims decided in Canada), *cert. denied*, 502 U.S. 1095 (1992). Such judgments are entitled to the same preclusive effect as a judgment entered upon a jury verdict for purposes of Section 1738. *See, e.g., Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 385 (2d Cir. 1989).

[10] The court below reasoned, citing Judge Friendly's dicta in *National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9 (2d Cir. 1981), that a state court lacked the power to approve the settlement of claims over which it could not assert jurisdiction for purposes of adjudication. App. 28a-34a. This assertion is plainly wrong. Approving a settlement including the release of federal claims is not an exercise of subject matter jurisdiction over those claims. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1288 (9th Cir.) ("it was not necessary . . . to actually exercise subject matter jurisdiction over the claims to approve their release"), *cert. denied*, 113 S. Ct. 408 (1992); *Abramson*, 392 F.2d at 762 (in personam jurisdiction provides state court with authority to approve release of federal claims regardless of

This Court has consistently rejected arguments that federal statutes limit the scope of Section 1738. In *Migra v. Warren County Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984), which addressed the interplay between Section 1738 and 42 U.S.C. § 1983, this Court stated that Section 1738 "embodies the view that it is more important to give full faith and credit to state court judgments than to ensure separate forums for federal and state claims." *See also Allen v. McCurry*, 449 U.S. 90, 97-98 (1980) (no basis to find that the creation of a federal cause of action under Section 1983 impliedly repeals the Full Faith and Credit Act). And, in analyzing the relationship between Section 1738 and the Anti-Injunction Act, 28 U.S.C. § 2283, this Court reversed a judgment of the Eleventh Circuit, which "gave unwarrantedly short shrift to the important values of federalism and comity imbeded in the Full Faith and Credit Act." *Parsons Steel*, 474 U.S. at 522-23; *see also Kremer*, 456 U.S. at 463, 476 (Title VII does not "supersede the principles of comity and repose embodied in § 1738"); *Marrese*, 470 U.S. at 385-86 (the concerns underlying Section 1738 "certainly are not made less compelling because state courts lack jurisdiction over federal antitrust claims").

"[A]n exception to Section 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, 456 U.S. at 466 (absent "manifest incompatiblity" on the face of the statute no implied repeal will be found); *see also Marrese*, 470 U.S. at 380. Thus, the inquiry is not, as the Ninth Circuit had it, whether Congress intended Section 1738 to apply to a state judgment depending on the type of claims at issue. App. 34a. Section 1738 applies to *all* state judgments. *Marrese*,

subject matter jurisdiction); *Grimes*, 17 F.3d at 1563-64 ("the Delaware court did not exercise any inherent power to release causes of action that it had no jurisdiction to entertain. Rather the Delaware court only acted to enter a settlement agreement that was initiated, negotiated, and adopted by the parties to a lawsuit that was properly before it"). Entry of judgment upon a class settlement containing a broad release of exclusively federal claims "does not in any way interfere with or limit the jurisdiction of the . . . federal court." *Nottingham Partners v. Dana*, 564 A.2d at 1105. That the settlement of federal claims by a state court is not a question of jurisdictional power is evident in the acknowledgment by the court of appeals of the finality of state court settlements of 1934 Act claims in individual and shareholder derivative suits. App. 37a-38a & n.32.

470 U.S. at 380; *Kremer*, 456 U.S. at 466-68. The proper issue is whether Congress in enacting the Williams Act expressly or impliedly created an exception to Section 1738. The Williams Act creates no such exception. *See, e.g., Murphy*, 761 F.2d at 884-85 (concluding that state court judgment precluded later federal securities law action and holding that Exchange Act neither expressly nor impliedly repealed Section 1738).[11]

The court of appeals' decision plays havoc with state court judgments and settlements generally.[12] The court of appeals failed to explain why unique safeguards should be created for members of classes certified in state courts who may be able to assert federal claims. Here the class members in the Delaware action were given the due process of notice, an opportunity to object, and the right to opt out. Although the court of appeals

[11] The court of appeals analyzed the preclusive effect of the Delaware judgment by misapplying the concept of issue preclusion. *See* App. 28a-37a. Issue preclusion is not a limitation on the scope of a release. Issue preclusion bars relitigation of an issue actually litigated in the prior proceeding. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). The court of appeals adapted an issue preclusion test from *TBK*, even though the court acknowledged that case was not controlling here. *TBK* involved a federal court's approval of a settlement that extinguished state claims. *TBK* did not implicate the Full Faith and Credit Act and did not apply Delaware law. Even so, the court below misread *TBK*, which in fact held that "where there is a realistic identity of issues between the settled class action and the subsequent suit . . . . the paramount policy of encouraging settlements takes precedence." *TBK*, 675 F.2d at 461. The court of appeals' attempt to use the concept of issue preclusion is badly confused. The Full Faith and Credit Act requires federal and state courts to apply Delaware preclusion principles to the Delaware *judgment*, which embodies the terms of the class settlement. A court may limit the preclusive effect to the claims alleged in a complaint only when the representative class members did not have authority to compromise other claims arising from the transaction embodied in the suit. *See, e.g., Super Spuds*, 660 F.2d at 17. There was no such limitation of authority here.

[12] The court of appeals' decision will have an impact on a wide variety of cases in which facts underlying state law claims also may form the basis of exclusively federal claims. These include admiralty, 28 U.S.C. § 1333 (1988); antitrust, 15 U.S.C. § 15 (1988); commodity exchanges, 7 U.S.C. § 25(c) (1988); C.E.R.C.L.A., 42 U.S.C. § 9613(b) (1988); patent and copyright, 28 U.S.C. § 1338 (1988); and securities, 15 U.S.C. § 78aa (1988).

belittled the right to opt out as impractical and therefore inconsequential, *see* App. 39a-40a, this Court observed in *Shutts* that "the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so." 472 U.S. at 813. Indeed, as the Third Circuit observed in *Grimes*, the fact that judicial review attends a judgment entered upon a class action settlement enhances the force and effect of the release upon non-representative class members because its fairness has been evaluated by a court:

> As a judgment, the settlement and release of claims is a contract that not only is agreed upon by the parties, but also is stamped with the imprimatur of the court with jurisdiction over the parties and the subject matter of the lawsuit.

17 F.3d at 1557.

In the analogous situation of the recognition by one state court of a judgment of another state court regarding a matter purportedly outside its jurisdictional competence, this Court has been very clear. When a class member has notice that court approval of a proposed settlement will release claims that could not be adjudicated in the releasing court and the class member fails to object to the release, the class member cannot raise that objection in another court. *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Assoc.*, 455 U.S. 691, 710 (1982). Finding that preclusive effect must be given to the release, this Court held that the class member was "obliged to advance its argument that the [settling] Court did not have the authority to settle [those claims] when it was given the opportunity to do so [in that court]." *Id.* This Court made clear that "the rule of jurisdictional finality established in *Durfee v. Duke*" applied even though another court might have "exclusive jurisdiction over the subject matter of this litigation." *Id.* at 705 n.11.

Finally, the court of appeals ignored the substantial public policy issues inherent in affording full faith and credit to state court class action judgments recognized by the First and Third Circuit Courts in *Nottingham* and *Grimes*: advancing state-

federal comity, honoring parties' legitimate expectations, avoiding piecemeal litigation, encouraging settlements, and preventing forum shopping. As stated in *Sandler*:

> [T]he state court-approved release forecloses this federal action based on principles of comity between state and federal courts. *To deny effect to a release of claims merely because it was given in an action commenced in state court would invite unprecedented consequences.* Such a doctrine would unjustifiably proliferate litigation, defeat legitimate expectations of the settling parties, engender uncertainty among class members and defendants as to their ability to retain the benefits of settlements, discourage settlements altogether and create unwarranted conflict between state and federal courts.

818 F. Supp. at 705 (emphasis added).[13]

II. IMPLYING A PRIVATE RIGHT OF ACTION UNDER RULE 14d-10 VIOLATES PRINCIPLES ANNOUNCED BY THIS COURT AND CONFLICTS WITH DECISIONS OF THE DISTRICT OF COLUMBIA, THIRD AND SIXTH CIRCUIT COURTS OF APPEAL

This Court has limited the judicial implication of private rights of action to situations where Congress has indicated that there should be such a right. *See, e.g., Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 94 n.31 (1981) ("[i]n a case in which neither the statute nor the legislative history reveals a congressional intent to create a private right of action ... we need not carry the *Cort v. Ash* inquiry further"); *Thompson v. Thompson*, 484 U.S. 174, 190 (1988) (Scalia, J., concurring) ("[t]he recent history of our holdings is one of repeated rejection of claims of an implied right").[14]

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[13] *See Nottingham*, 925 F.2d at 33 (if Respondents were "dissatisfied with the Delaware judgment, their recourse was to the United States Supreme Court by certiorari, not to the lower courts in vain pursuit of back door relief").

[14] *See also Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 420 (D.C. Cir. 1992) (Ginsburg, J.) ("[o]ver the years since *Borak* ... the Court has exercised greater restraint in the implication of private rights of action"); *Smith v. Dearborn Fin. Servs., Inc.*, 982 F.2d 976, 980 (6th Cir. 1993) (same); *Spicer v. Chicago Bd. of Options Exch., Inc.*, 977 F.2d 255, 258 (7th Cir. 1992) (same); *Health Care Plan, Inc. v. Aetna Life Ins. Co.*, 966 F.2d 738, 740 (2d Cir. 1992) (same).

The court of appeals dismissed the notion that this Court's implied right of action jurisprudence has shifted in recent years toward a more restrictive approach:

> Matsushita's argument that there has been a recent sea change in the Court's implied right of action jurisprudence is based on wishful thinking, not case law. The argument is essentially the same one advanced by Justice Scalia in his concurring opinion in *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring in the judgment), where he urged his colleagues to "get out of the business of implied private rights of action altogether." *Id.* at 192. The problem is that no other justice of the Court has yet to endorse the "get out of the business" approach to implied causes of action.

App. 9a-10a (footnote omitted).

The position advanced by Matsushita, but mischaracterized and summarily rejected by the court of appeals, merely reflects adherence to this Court's repeated teaching that "recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) (citation omitted). Two corollaries of this doctrine are equally important here: first, "the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended," *id.*; second, even if a statutory provision is found to be privately enforceable, agency rules promulgated thereunder do not automatically provide for a private right of action. Instead, a private party asserting an implied right of action must overcome the " 'hurdle facing any litigant' seeking to extend an implied right to a class with claims not comparable to those previously recognized." *Roosevelt*, 958 F.2d at 420-21 (quoting *Virginia Bankshares*, 501 U.S. at 1104). The court of appeals failed to examine the language, structure or purpose of Rule 14d-10, and ignored the fact that the Rule goes well beyond the scope of Section 14(d)(7).[15]

[15] Improperly consulting the contemporary legal context "[i]n 1968 when the Williams Act was enacted," the court of appeals reasoned that because "various lower federal courts had construed *Section 10(b)* of the 1934 Act as providing a private cause of action," it should be inferred that Congress intended that *Section 14(d)(7)* also so provides, and thus, automatically Rule 14d-10 as well. App. 6a (emphasis added). But Section 10(b) is irrelevant here; Rule 14d-10 was not promulgated pursuant to Section 10(b). *See*

The court of appeals' holding concerning a private right of action is inconsistent with *Roosevelt, supra, Ashbrook v. Block*, 917 F.2d 918 (6th Cir. 1990), and *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). These cases all employ a *two*-step inquiry to determine whether there is an implied right under an agency rule: (1) did Congress intend the enabling statute to create a private remedy that could be delegated to agency rulemaking, *and* (2) is the rule drafted such that a private right may be legitimately implied. *Roosevelt*, 958 F.2d at 421-25; *Ashbrook*, 917 F.2d at 926; *Angelastro*, 764 F.2d at 947-48.[16] The court of appeals ignored the second step of the analysis and stated the implication test as follows: "an agency rule contains a private right of action if Congress intended the statute under which it was promulgated to be privately enforceable." App. 5a n.8. This is a new implied right of action test of unprecedented breadth. The inevitable consequence of the court of appeals' reasoning is that Congress intended an implied right of action under each of the *ten* Rules promulgated under Section 14(d)(7) of the Williams Act. As this Court suggested in another context:

> If we were to rely on this reasoning now, we would be obliged to hold that a private right of action exists for every provision of the 1934 Act .... *There would be no logical*

Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 948 n.14 (3d Cir.) ("Congress' intent to permit private rights of action [under an SEC regulation] must stem from . . . the provision which granted the Commission the power to adopt the Rule"), *cert. denied*, 474 U.S. 935 (1985). Moreover, this Court has sanctioned consultation of historical implication standards only in two narrowly-defined circumstances, neither of which is raised by Rule 14d-10. *See Thompson*, 484 U.S. at 189-90 (Scalia, J., concurring); *see also Health Care Plan*, 966 F.2d at 742 ("we are told to determine whether a private cause of action is implied by applying the law in effect at the time of decision—[presently] a structured inquiry into Congress' intent—rather than the method of analysis that courts applied at the time of a statute's enactment").

[16] Federal district courts uniformly recognize the need to analyze SEC rules under a two-step analysis, in which the second step has had dispositive significance. *See, e.g., Arst v. Stifel Nicolaus & Co. Inc.*, 871 F. Supp. 1370, 1376-77 (D. Kan. 1994) (no private right under SEC Rule 10b-10 even though Section 10(b) provides such a right); *Siedman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 465 F. Supp. 1233, 1237 (S.D.N.Y. 1979) (no private right under SEC Rule 15c3-3(b) even though Section 15(c) of the Exchange Act was then interpreted to afford such a right).

> *stopping point to this line of reasoning* .... This approach, with its far-reaching consequences, would work a significant shift in settled interpretive principles regarding implied causes of action.

Central Bank, 114 S. Ct. at 1455 (emphasis added); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979) ("we decline to read [*Borak*] so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action").

Rule 14d-10 states only that "[n]o bidder shall make a tender offer" unless the provisions of the Rule are followed. This language does not create a substantive right in the security holder; rather, it places a negative restriction on the bidder, which does not signify intent to confer a private right of action. *See Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 929 (10th Cir. 1994) ("a mere proscription of behavior does not justify an inference of a private cause of action for its violation; instead, there must be some evidence that Congress intended one") (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979)); *Health Care Plan*, 966 F.2d at 741 ("obligations, in and of themselves, do not provide a basis for conferring a private right of action on [beneficiaries of statute], without further indication of congressional intent"). Nor is there any mention of a private right of action in the numerous SEC releases promulgating and explaining Rule 14d-10.[17]

Courts should be particularly reluctant to imply a private right of action where, as here, the language of the Rule goes beyond the requirements of the statute. Congress enacted Section 14(d)(7) to ensure that shareholders who tendered their shares early in the course of a tender offer would receive the benefit of a subsequent increase in the tender offer price *during the tender offer*. *See Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 874 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974). As interpreted by the court of appeals, for purposes of establishing a violation, Rule 14d-10(c)(1) "obviates the need for plaintiffs" to prove that any shareholder received "higher consideration" during a tender offer when more than one type of consideration is offered. App. 13a, n.17. Thus, as interpreted by the court of appeals, a violation of Rule 14d-10 can be established without

[17] *See, e.g.*, SEC Release No. 34-22198, 1985 SEC LEXIS 1175 (July 1, 1985); SEC Release No. 34-23421, 1986 SEC LEXIS 1179 (July 11, 1986).

proof that higher consideration was paid to certain shareholders, and without regard to timing, both of which are integral to Section 14(d)(7).

Finally, unlike any provision of Section 14(d)(7), Rule 14d-10(e) allows the SEC to exempt transactions from the Rule's application. Such a provision is inconsistent with a private right of action because it would allow the SEC to suspend such a right by discretion. *See Touche Ross*, 442 U.S. at 574; *cf. Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478 (1977) ("we are reluctant to recognize a [private] cause of action here to serve what is 'at best a subsidiary purpose' of the federal legislation").[18]

III. THE COURT OF APPEALS EXPANDED RULE 14d-10 IN CONFLICT WITH THE LAW IN THE FOURTH CIRCUIT AND THE TENDER OFFER REGULATORY SCHEME CREATED BY CONGRESS

Section 14(d)(7) requires a bidder that raises its offer "before the expiration" of a tender offer to pay the higher consideration to shareholders who tendered shares prior to the announcement of the higher offer. In accordance with this statutory enabling provision, Rule 14d-10 is operative only "during [a] tender offer." The entire statutory and regulatory scheme in this area revolves around a clearly-defined tender offer period because certainty in the planning of transactions is of critical importance.

This Court has recognized that parties attempting to structure complex corporate transactions to comply with the federal securities laws must be afforded certainty and predictability. *See Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985) (rejecting efforts to "inject uncertainty into the tender offer process"); *see also Pinter v. Dahl*, 486 U.S. 622, 652-53 (1988) (securities industry "demands certainty and predictability"). The regulation of tender offers is an issue of national importance.

[18] The SEC reviewed Matsushita's acquisition of MCA and had the authority to bring an injunction action if appropriate. The possibility that an implied right of action might "enhance the administrative remedies provided" under the Williams Act is not a justification for implying a private right of action. *Harper v. Federal Land Bank*, 878 F.2d 1172, 1176-77 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990); *see also Central Bank*, 114 S. Ct. at 1448. In situations in which Congress explicitly relied upon an administrative scheme to induce compliance, courts "should be particularly reluctant to imply a private cause of action without sufficient evidence of Congress' intent." *Health Care Plan*, 966 F.2d at 741 (citing *Touche Ross*, 442 U.S. at 574).

Through tender offers, corporations redistribute assets, unlock the value of moribund publicly-held stock, and increase global competitiveness. The value of the 80 tender offers launched in the United States last year exceeded $53 billion. By their nature, tender offers customarily cut across national and international boundaries.

Rejecting concerns about certainty and planning, the court of appeals held that if a private purchase such as the Wasserman transaction is conditioned on a tender offer, it should be deemed an integral part of the tender offer. App. 18a. Thus, the court of appeals reasoned, the tender offer does not end until the private purchase is consummated and therefore, such a private purchase takes place "during the tender offer" and falls within the scope of Rule 14d-10. App. 17a, n.19.[19]

But why should the mere "conditioning" of a stock purchase agreement on the consummation of a tender offer convert a separate transaction—done during one time period—into an "integral part" of a tender offer in a different time period? The parties have stipulated that the Wasserman transaction was agreed to and consummated when no tender offer was pending.[20]

The court of appeals' interpretation of Rule 14d-10 creates a direct conflict with the law of the Fourth Circuit. *Kahn, supra*, involved a series of overlapping and interrelated transactions that straddled a public tender offer. The district court in *Kahn* held that "*because no purchases occurred during the pendency of the tender offer*," the Rule 14d-10 claim must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). 783 F. Supp. at 272. The Fourth

[19] The court of appeals' expansion of Rule 14d-10 will inevitably give rise to challenges to executive compensation arrangements that are typically made by a tender offeror with incumbent management. Thus, employment arrangements entered into for the purpose of securing continuity of management may be challenged as disguised payments for tendered shares regardless of when the payments are made. Indeed, the court of appeals remanded for trial a Rule 14d-10 claim involving an employment-related payment to MCA's President, Sidney Sheinberg. App. 23a.

[20] Specifically, in the pre-trial order in the district court litigation, the parties stipulated that (1) the Wasserman transaction was entered into on November 26, 1990, (2) on November 30, Matsushita filed a Schedule 14D-1 [*the event commencing the tender offer period, see* Rule 14d-2], (3) at 12:05 a.m. on December 29, Matsushita gave notice of acceptance of the tendered shares [*the event terminating the tender offer*], and (4) the Wasserman transaction was consummated thereafter. *See* ER 354 § 5, ¶¶ 16, 17, 19, 21.

Circuit affirmed. *See Kahn*, 13 F.3d at 111-13 (recounting district court's analysis). Thus, once it was determined that the private stock transactions did not take place "during the tender offer period," no further analysis was necessary.

The court of appeals sought to distinguish *Kahn* solely on the ground that the private stock purchase in *Kahn* was "unconditional." App. 19a. Nothing in either *Kahn* decision suggests that this is so. Moreover, official disclosure documents filed by the *Kahn* parties with the SEC make clear that the private purchases were expressly conditioned on the success of the public tender offer. *See* App. 108a. In short, this case is not distinguishable from *Kahn* in any meaningful way, and a transaction which is sanctioned in the Fourth Circuit is now illegal in the Ninth Circuit. Tender offerors should not be subject to such "conflicting regulatory requirements." *Kahn*, 783 F. Supp. at 270.

The court of appeals' construction of Rule 14d-10 ignores this Court's mandate that a court may not expand the reach of a rule beyond its express language. *See Central Bank*, 114 S. Ct. at 1447 ("the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit") (citation omitted). By its terms, Rule 14d-10 is limited in its reach. The Rule prohibits certain payments "during such tender offer." Rule 14d-10 plainly does not presume to regulate payments that are "conditioned" on the success of a tender offer, or are "an integral part of" a tender offer. "During" means "[t]hroughout the course or duration of" or "[w]ithin the time of." Webster's II, New Riverside Dictionary (1984). The term connotes a finite temporal interval which the Ninth Circuit read out of the Rule by expanding its proscriptions to reach transactions not within the temporal confines of the Rule.

The SEC extensively considered *and rejected*—both before and after the adoption of Rule 14d-10—tender offer rules governing post-tender offer stock purchases.[21] Rejection of these

[21] *See, e.g.*, SEC Release No. 34-15548, 1979 SEC LEXIS 2204 at *19 (Feb. 5, 1979) (proposing Rule 14d-8 which sponsored 40 day post-offer integration period); SEC Release No. 34-16384, 1979 SEC LEXIS 217 at *3 (Nov. 29, 1979) (withdrawing proposed Rule 14d-8); SEC Release No. 34-16385, 1979 SEC LEXIS 218 at *34-50 (Nov. 29, 1979) (proposing Rule 14e-4 which is first proposal to codify "all-holders" and "best-price" principles later adopted as Rule 14d-10; and simultaneously proposing separate Rule 14e-5 prohibiting purchases by bidder for 10 days following termination of tender offer, which rule is never adopted); SEC Release No. 34-24976, 1987

proposals by the SEC negates the court of appeals' proposition that they are nevertheless now embraced in Rule 14d-10. *See Fogel v. Chestnutt*, 533 F.2d 731, 752-53 n.25 (2d Cir. 1975), *cert. denied*, 429 U.S. 824 (1976); *see also TransCanada Pipelines Ltd. v. Federal Regulatory Comm'n*, 878 F.2d 401, 411 (D.C. Cir. 1989) (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). [22]

Both Section 14(d)(7), the enabling statute for Rule 14d-10, and Rule 10b-13, which regulates side purchases during a tender offer, cease operation when the tender offer expires. *See Kramer v. Time Warner, Inc.*, 1990-91 Fed. Sec. L. Rep. (CCH) ¶ 95,619, at 97,902 (S.D.N.Y. 1990), *aff'd*, 937 F.2d 767 (2d Cir. 1991).[23] The SEC has stated that the tender offer rules are designed so that "security holders will have only one date to be concerned with—the expiration date." SEC Release No. 34-23421, 1986 SEC LEXIS 1179 at *46 (July 11, 1986); *cf. Gustafson v. Alloyd Co., Inc.*, 115 S. Ct. 1061, 1069 (1995). Eliminating the temporal limitation on Rule 14d-10, as the court of appeals did here, will confound tender offerors and shareholders alike and undermine the predictability of the entire regulatory scheme.

SEC LEXIS 3545 at *28-33 (Oct. 1, 1987) (proposing 10 day post tender offer integration period that has never been adopted).

[22] A defined time period also is consistent with the two purposes of Rule 14d-10: (1) to ensure that the "highest price paid to any tendering security holder . . . be paid to any other tendering security holder," and (2) to prevent discriminatory tender offers made to fewer than all holders, which pressure the excluded group to sell to the favored group (at a reduced price) before the expiration of the offer. *See* SEC Release No. 34-23421, 1986 SEC LEXIS 1179 at *10, *27 (July 11, 1986). Thus, Rule 14d-10 should be interpreted as written and intended by the SEC and not as a general "antidiscrimination" provision which reaches into matters properly within the purview of state law. App. 12a. The federal securities laws "create an extensive scheme of civil liability," and each regulation plays a distinct role. *Central Bank*, 114 S. Ct. at 1445, 1451.

[23] Other federal tender offer regulations are triggered by the end of the tender offer period. For example, SEC Rule 14e-1(c) requires payment of the tender consideration "promptly after the termination" of the offer. If the tender offer rules do not operate within a clearly defined time frame, the operative event for such Rules will be in doubt.

CONCLUSION

The decision of the court of appeals is at odds with the law of this Court on each of the issues as to which Matsushita seeks certiorari. The decision also directly conflicts with the law of the District of Columbia, First, Second, Third, Fourth, and Sixth Circuit Courts. In addition to the dramatic adverse impact of this decision on state and federal litigation in this country, the decision exposes Matsushita to a multi-billion dollar liability. The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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